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January 28, 2019

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Mr. Roxanne Rothschild
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National Labor Relations Board
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Via Electronic Submission Through
www.regulations.gov and
Regulations@nlrb.gov

January 28, 2019

RE: RIN 3142-AA13; Notice of Proposed Rulemaking;
The Standard for Determining Joint-Employer Status; 83 Fed. Reg. 46681 (2018).

Dear Ms. Rothschild:

On behalf of the government contracting and defense industry community, I write in strong support of the National Labor Relations Board's (Board's) above-referenced rulemaking.

My clients include defense companies operating in the heavy industrial space. These companies employ thousands of organized workers in over 100 different trades. The flexibility provided by temporary staffing is critical to cost-effective production for our national defense. Treating my clients' temporary workers as "employees" would not be feasible. Further, it would destabilize labor relations, contrary to the underlying goals of the National Labor Relations Act (NLRA).

A simple, easy-to-apply standard that does not unreasonably sweep temporary contract workers under a "joint employee" standard should be the Board's goal. The common law and labor policies under which this standard has operated for decades, further informed by the D.C. Circuit's recent *Browning-Ferris* opinion, should constitute the Board's guideposts.

Although we are in favor of the Board's proposed language, we recommend the following enhancements. ***First***, the Board should consider altering the proposed rule to adopt, word-for-word, the 25-year old common law standard, which requires that "both employers exert *significant* control over the same employees in that they share or co-determine those matters

governing the essential terms and conditions of employment."[1] ***Second***, the Board should consider defining key terms associated with the joint employer standard under the NLRA. ***Third***, the Board should consider delineating what terms and conditions are "essential" to make collective bargaining "meaningful."[2] ***Fourth***, and linked to the third item above, the Board should consider addressing what "meaningful collective bargaining" might require and provide examples.[3]

Finally, if the Board decides to make significant changes to its proposed rule, we recommend issuing a revised proposed rule to allow the public another opportunity to comment before the joint employer standard is finalized.

1. Impact of D.C. Circuit's Browning Ferris Decision

We are grateful for the extension of time in which to address the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *Browning-Ferris Industries of Cal., Inc. v. National Labor Relations Board (Browning-Ferris).* Rather than clarifying the joint employer standard, that decision only underscores the need for this rulemaking.

As evidenced by the eighty-page, divided panel's opinion, the D.C. Circuit's *Browning-Ferris* decision raises more questions than answers. Although the Court upheld the *relevance* of indirect control under the joint employer standard, it simultaneously rejected the Board's underlying treatment of indirect control as inconsistent "with common-law limitations."[4] The Court found the Board failed to address "whether the putative joint employer *possesses sufficient control* over employees' *essential terms and conditions to permit meaningful collective bargaining*."[5] In so doing, the Board "overshot the common-law mark" by "failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting."[6] Ultimately, the Court refused to enforce the Board's *Browning-Ferris* decision, and remanded for further proceedings.

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[1] *Browning-Ferris Industries of Cal., Inc. v. National Labor Relations Board*, No. 16-1028, U.S. Court of Appeals for the D.C. Cir. (Dec. 28, 2018) at 22 (quotations eliminated and emphasis added).
[2] *Id.* at 48.
[3] *Id.* at 49.
[4] *Id.* at 4.
[5] *Id.* at 48. Indeed, the Court faulted the Board for "never delineat[ing] what terms and conditions are 'essential' to make collective bargaining 'meaningful' . . . nor . . . clarify[ing] what 'meaningful collective bargaining' might require." *Id.* at 49.
[6] *Id.* at 38.

The uncertainty and legal tumult still emanating from the *Browning-Ferris* decision cries out for a swift and comprehensive resolution best addressed by rulemaking.[7] As the D.C. Circuit recognized, a rulemaking would allow the Board to exercise "policy expertise . . . on applying the National Labor Relations Act to joint employers . . . bounded by the common-law's definition of a joint employer."[8] In contrast to being limited by the facts of a given case, a rulemaking enables the Board to provide a broad foundation for application of the standard across an array of circumstances, informed by a variety of perspectives. Indeed, how better to discern where to draw the line between an employer's control of "workers' essential terms and conditions" from "the routine parameters of company-to-company contracting" than by hearing from a broad and diverse group of interested parties on that very question?

2. *A Well-Grounded and Easy-to-Apply Joint Employer Standard Is Essential for Heavy Industry Supporting National Defense and Will Benefit Their Workers and Those of Temporary Staffing Agencies*

My clients include defense companies operating in the heavy industrial space. They sell their products and services to the Department of Defense (DoD), other federal agencies, and commercial customers. These companies employ thousands of organized workers in over 100 different trades. As a result, a single company often negotiates with multiple unions and an even greater numbers of collective bargaining units.

Subcontracted staffing is essential to my clients' operations. When required, a single company might engage more than thirty separate staffing agencies to provide temporary workers needed for large-scale industrial projects. These projects – both new construction and repairs – are often critical to our national defense. They require hundreds of workers to be staffed under extremely tight timelines in order to meet the government's needs. Unforeseen issues often arise, resulting in some trades being needed one day, but not the next, or being moved from one job assignment to another based on work flow and material availability. The flexibility provided by temporary staffing is critical to the cost-effective operations of companies in the heavy industrial space and to our national defense.

Treating these temporary workers as "employees" would simply not be feasible for heavy industry. My clients would face the impossible task of processing hundreds of new hires in only days or weeks, only to have to let them go days or weeks later, and repeat the same wasteful process countless times throughout the year. But even that scenario improperly assumes workers could be "easily" let go, when instead, existing union-driven layoff provisions for *all* employees are based not on seniority but factors that would be challenging to apply to temporary workers, including bi-weekly performance evaluations. By placing temporary staff in the same pool of regular employees, long-term employees could be forced out of jobs by those who do not even desire long term positions, but who prefer to go where the wage rates and per diem allotments

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[7] Though finalization of the rule may take some time, we believe that timeline to be far shorter than attempting to rebalance the joint employer standard through multiple adjudications.
[8] *Id.* at 21.

provide them more cash in exchange for less long-term stability. Avoiding these hiring complexities and allowing flexibility for both temporary workers and the companies who need them is precisely the reason staffing agencies thrive, fulfilling a vital role in our economy.

Indeed, unless a properly defined joint employer standard is re-established, staffing agencies could not possibly stay in business. As joint employers, they would become obligated to bargain in good faith with bargaining representatives of the jointly-employed workers, many times over, alongside industry customers operating in widely different contexts. Additionally, they could be found jointly and severally liable for unfair labor practices committed by their customers. Finding staffing agencies to be inextricably tied to their customers in these ways would force staffing agencies to accept undue risk, effectively undercutting their entire business.

And, although we agree a joint employer standard is essential for the protection of workers, unless reasonably cabined, that "protection" could quickly become an undue burden for workers seeking the flexibility and freedom to move to different assignments. Temporary staffing agency workers are currently provided compensation, insurance, and other benefits through their staffing agency employers. But under an unworkable joint employment standard, these workers would need to go through the hiring process and enroll in benefits at each client site where they are assigned temporarily. For subcontract workers who move from assignment to assignment after days or weeks of work, that prospect would be untenable.

Finally, maintaining a more workable standard will benefit unionized employees as well. Finding hundreds of different temporary workers to be "joint employees" would wreak havoc in the collective bargaining process, and place at the bargaining table an inordinate number of companies with distinct demands, risks, and operations. Such negotiations would be impossibly difficult and protracted with little hope of successful resolution. Destabilizing labor/management relations would result, contrary to the underlying purpose of the NLRA. As one such example, my clients have previously faced union demands for detailed personnel information of temporary workers based on a joint employer theory. Following the filing of a union grievance, legal fees, and adjudication, the matter was resolved in my clients' favor, but the significant expense to both sides could have been avoided under a clearer joint employment standard. The Board should attempt to craft a rule that will minimize such destabilization to avoid costs for the union, industry, and government customers/taxpayers.

3. Establishing the Joint Employer Standard: Control Over Essential Terms and Conditions of Employment and Proper Exclusion of the Routine Parameters of Company-to-Company Contracting

The D.C. Circuit's recent *Browning-Ferris* decision correctly concluded that, "for roughly the last 25 years, the governing framework for the joint-employer inquiry has been whether both employers 'exert *significant* control over the same employees' in that they '*share or co-determine*' those matters governing *the essential terms and conditions of employment.*'"[9]

The joint employer standard the Board proposes in this rulemaking should be enhanced to articulate what is meant by the terms: "significant control;" "share or co-determine;" and "essential terms and conditions of employment." Additionally, the Board should distinguish evidence of indirect control *that bears on workers' essential terms and conditions* from evidence that *simply documents the routine parameters of company-to-company contracting*. The Board may also choose to address whether indirect control could be "dispositive" in determining a joint employer relationship, given that issue was left unanswered in *Browning-Ferris,* a case that relied upon both direct and indirect control.

In making these determinations, we ask the Board to be mindful of the temporary staffing needs endemic to heavy industry that we outlined previously. Additionally, the Board should consider that the defense industry, like manufacturing and construction industries, must adhere to strict safety and security controls imposed by federal, state, agency, and program authorities. Moreover, the technical nature of the work at industrial and manufacturing companies requires trades' work performance to be reviewed for quality and accuracy. Whether a worker is subcontracted on a temporary basis or hired as a full-time employee, that worker must be trained to ensure regulations and guidelines are met for both safety and quality purposes. This type of oversight is mandatory and should not weigh into whether a worker is an "employee" given the level of control is not at the company's discretion, but operates by law.

4. Potential Enhancements To The Proposed Rule

The Board must realign the joint employer standard "consistently with common-law limitations."[10] As recognized by the court, the Board's policy expertise should guide its application of the common law in a simple and common-sense manner that supports Congress' intent underlying the NLRA.

The Board's proposed language for § 103.40: Joint Employers is comprised of a single paragraph, followed by twelve examples. Currently the proposed rule reads:

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[9] *Id.* at 22 (emphasis added).
[10] *Id.*

§ 103.40: Joint employers.

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

Although the Board could opt to defend its current proposed rule as consistent with the common law, we suggest the following enhancements:

- ***First***, the Board should consider using the same words that map the 25-year old common law standard, which requires that "both employers exert *significant* control over the same employees in that they share or co-determine those matters governing the essential terms and conditions of employment."[11]

- ***Second***, the Board should consider exercising its policy expertise to determine how to define key terms associated with the joint employer standard under the NLRA.

- ***Third***, the Board should consider providing a framework for application of what the D.C. Circuit described as the "second step" of the joint employer standard articulated in *Browning-Ferris*.[12] That "second step" includes a delineation of "what terms and conditions are "essential" to make collective bargaining "meaningful."[13] Whether the Board opts to adopt this second step is within its discretion, but it could be helpful in providing an avenue for the Board to apply its expertise to ensure the joint employer standard does not unreasonably include temporary workers when doing so would wreak havoc on collective bargaining.

- ***Finally***, and linked to the third item above, the Board should consider addressing what "meaningful collective bargaining" might require and provide examples.

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[11] *Id.* at 22 (quotations eliminated and emphasis added).
[12] *Id.* at 49.
[13] *Id.*

We suggest the following proposed alternative, further explained below.

§ 103.40: Joint employers.

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine *a significant number of* the employees' essential terms and conditions of employment, such as hiring, firing, *compensation, benefits*, discipline, supervision, and direction. A putative joint employer *must possess and exercise* substantial control over *a significant number of* the employees' essential terms and conditions of employment in a manner that is not limited and routine *and that would permit meaningful collective bargaining. Substantial control means a similar level of economic control that an actual employer would possess over its own employees, regardless of whether that control passes through an intermediary. Control must consist of action that rises above mere "influence."*

Summary of proposed revisions: The first sentence adds "a significant number of" to modify the number of an employee's essential terms of employment that must be shared or co-determined. We also added to the first sentence "compensation" and "benefits" to the list of essential terms and conditions of employment.

As we recommend above, the Board should consider whether it makes sense to separately list and define terms, such as "essential terms and conditions of employment"; "share or codetermine"; "substantial control over a significant number of the employees' essential terms and conditions of employment"; "limited and routine"; and "meaningful collective bargaining." We address several of these concepts in the numbered paragraphs below.

In the second sentence, language that might exclude considerations of indirect control are removed (i.e., "actually" with respect to "exercise;" and "direct and immediate" with respect to "control"). Removal of these terms may be done while preserving the reasonable view, left undisturbed by the D.C. Circuit, that indirect control, by itself, cannot establish a joint employer relationship. In other words, a company must not only "possess" but also "exercise" substantial control over workers' essential terms and conditions of employment to be considered a joint employer.

We also suggest once again inserting the phrase "a significant number of" to define the scope of how many employment conditions must be controlled by the putative employer.

Additionally, we add "and that would permit meaningful collective bargaining," to cabin the joint employer standard to one that actually makes sense given the underlying purpose of the NLRA. We also add additional sentences to indicate that substantial control is understood as that which would be required by a true employer, not merely "influence" applied through a customer relationship.

1. ***Control vs. Influence***

The term "control" is operative. Indirect control should be understood to mean that the action is one step removed from the essential employment decision made, but that such action "controlled" and did not merely "influence" that action. Indirect control should be considered along with all the facts and circumstances, including how often indirect control is actually exercised; how many employees are impacted by the indirect control; and whether the indirect control governs a significant number of essential terms and conditions of employment.

2. ***What types of control are intrinsic to third-party contracting relationships (i.e. "the routine parameters of company-to-company contracting") These might also be considered "limited and routine" control of third-party workers on a job site:***

We recommend including carve outs for these commonplace provisions associated with company-to-company contracting, particularly for industry hiring temporary trades workers.

"***Hire & Fire***": Companies should be able to increase or decrease staffing needs with temporary staffing agencies without creating a joint employer relationship. Companies should also be permitted to request staffing agencies to remove third-party workers from a job site for any or no reason without creating a joint employer relationship.

"Job Skills": Companies should be able to request the type of skills temporary workers must possess without creating a joint employer relationship.

"Supervision and Placement": Companies should be able to provide basic direction and supervision as to where and how temporary workers must perform without creating a joint employer relationship.

"***Safety/Security Training***": Companies should be able to train all temporary workers in security and safety rules and to ensure all workers maintain compliance with those rules without creating a joint employer relationship.

"Performance Evaluation": Companies should be permitted to express satisfaction and/or dissatisfaction regarding performance by third-party workers to their staffing agencies without creating a joint employer relationship. A staffing agency may request feedback on its own employees from job site companies without creating a joint employer relationship.

"Quality Control": Companies should be permitted to review the quality of the work performed by a third-party worker without creating a joint employer relationship.

"Right to Hire": Companies should be permitted the right, but not the obligation, to hire temporary workers as employees after a designated period of time without creating a joint employer relationship.

"Notice of Availability of Workers": Companies should be permitted to require notice of temporary worker absences or resignations without creating a joint employer relationship.

"Compliance With Legal Requirements": Companies should be permitted to require their staffing agencies abide by all applicable employment laws and regulations, including immigration requirements, payroll taxes, standards of business ethics and conduct; training; background checks/credit history/drug screening; and pay auditing, without creating a joint employer relationship.

3. What types of indirect and/or direct control are sufficient to trigger joint employment?

If a company is allowed to control a significant number of the third-party's essential employment conditions, such as wage rates (including direct review of individuals and their entitlement to a given wage; whether rate of pay will increase over time and at what rate); benefits (types of insurance, vacation, medical, etc.); hiring and firing (interview/application forms and protocols; interview requirements; individual hiring decisions; protocols for seeking job applicants; availability and placement of employees; conduct that requires a warning; conduct that requires termination; how to hire and promote from within); discipline (conduct that requires a warning; conduct that requires termination); supervision (how to review the employee's performance across job sites; how job-site reviews will be recorded and the consequences stemming from such feedback; any incentives for good work ethic/excellent performance from job sites), those factors should be considered along with all the facts and circumstances, and other limitations of the Board's rules on joint employer status.

Indirect control should be considered along with all relevant facts and circumstances in evaluating a joint employer relationship, including whether an employer maintains the authority to ultimately disagree or deny the indirect control, in which case such indirect control is mere "influence."

Appropriate consideration should be given to whether each employer maintains separate authority to determine other essential terms and conditions of employment for its employees; whether those conditions are the same or different as those that may be indirectly controlled, and whether those conditions constitute more significant conditions than those indirectly controlled.

For example, in the case of temporary staffing agencies, the staffing agency maintains direct control over their employees' wages and benefits, as well as the hiring and firing from the staffing agency. If an industry customer decides it no longer needs a temporary worker placed at their work site, that action does not terminate the temporary worker's employment relationship with the agency. Similarly, if an industry customer disciplines a temporary worker for failing to follow required safety protocols; and/or even requests removal for that reason, the temporary agency will have its own set of policies regarding whether and how to discipline that employee for failing to follow the customer's instructions/training; and how many "strikes" a temporary employee may receive from any of its placements before being terminated. The Board should

outline the importance of these differences and find in favor of a joint employer relationship only if the two employers "codetermine or share" the *same* work policies.

4. What types of "influence" are insufficient to trigger joint employment?

No form of influence (included that of a most favored customer) is sufficient to trigger joint employment unless that influence rises to a substantial level of control over a significant number of essential employment conditions.

5. What terms and conditions are essential to make collective bargaining meaningful?

Terms and conditions essential to make collective bargaining meaningful include payment of compensation and benefits; hiring; firing; discipline; supervision; and direction.

As suggested by the example in number (3), when two separate companies have overlapping and different policies, and each company maintains control over its own employment policies and does not co-determine, control, or share those same policies with another company, those policies are not meaningful to joint collective bargaining.

Whether putative joint employers share or codetermine a significant number of the same underlying employment policies that govern the conduct of their putative shared employees should be considered in whether collective bargaining is meaningful. An important consideration of this question is whether the putative employers have different business aims and risks and whether those aims and risks require the same employment policies for their employees.

Another important consideration is whether a company contracts with multiple contractors for workers; and whether those contractors, in turn, have multiple companies for which they provide labor.

6. How does one define "meaningful collective bargaining" and what might that entail in different settings?

Meaningful collective bargaining occurs when employers can effectively negotiate and resolve with an appropriately defined bargaining unit a set of desired working conditions. Meaningful collective bargaining cannot occur when distinct groups of employers or employees are unable to effectively negotiate due to their disparity of interests, or their inability to meaningfully participate due to a lack of true control over the terms and conditions of employment being negotiated.

Hypotheticals

We recommend the Board amend its hypotheticals to focus on the total level of control (regardless of whether direct and immediate or indirect) and determine in various new hypotheticals whether that level of control operates over a significant number of essential terms and conditions of employment to make collective bargaining meaningful.

We urge the Board to reconsider Example 8 and Example 11, which conclude that a company has "exercised direct and immediate control over essential terms and conditions of employment" when each hypothetical addresses situations where a company influences only one condition of employment on its contract workers (hiring in Example 8, and disciplining in Example 11).

Summary and Conclusion

History teaches us that the joint employer standard as applied under the NLRA would be best served if clarified by this rulemaking proceeding.

We thank the Board for providing the public an opportunity to comment on the joint employer standard given its significance to this industry. We agree that a rulemaking, rather than sequential adjudications, provides the best method for fostering "predictability and consistency regarding determinations of joint-employer status" and promoting labor-management stability.[14]

The Board should consider reissuing another proposed rule if significant changes are adopted by the Board. The public should be given another opportunity to comment on such changes before the joint employer standard is finalized.

We are confident that the Board's rule will provide more certainty to the business community, employees, and unions alike. Should you have any questions, please contact me.

Sincerely,

Cynthia J. Robertson

[14] 83 Fed. Reg. 46681.